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No.

In the

Supreme Court of the United States

October Term, 1992

New York State School Boards Association,
Petitioner,

v.

Thomas Sobol, New York State Commissioner of Education, and the New York State Board of Regents,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION TO APPEAR AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE NATIONAL SCHOOL BOARDS ASSOCIATION
TO APPEAR AS AMICUS CURIAE
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PETITION FOR WRIT OF CERTIORARI

The National School Boards Association (NSBA) moves this Court for leave to participate as Amicus Curiae herein, for the purpose of filing the attached brief in support of the Petition for Writ of Certiorari. Petitioner has consented to the filing of the brief. Petitioner's letter of consent is on file with the Clerk of this Court. Respondents have been requested to consent, but consent has been refused.

NSBA is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The decision below will be a precedent for allowing state boards of education and legislatures to mandate religion in the development of curriculum on any subject that the state believes is controversial.

School districts across the country are vitally interest in the particular subject involved in this case - HIV (human immunodeficiency virus) prevention education. If the decision below is allowed to stand it could seriously set back the efficacy of HIV

prevention education, thus limiting the only weapon we currently have against the disease.

The National School Boards Association urges this Court to grant it leave to present its views.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the

Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The decision below upholding a mandate of religious involvement in public school curriculum is a dangerous precedent for school districts across the country.

REASON FOR GRANTING THE WRIT

The decision below upholding the requirement of the involvement of religious leaders in public school curriculum development strikes at the heart of the principle of separation of church and state and threatens to embroil public schools across the country in religious battles over curriculum content in a variety of areas, including HIV prevention education programs.

ARGUMENT

Introduction

The New York Department of Education, in its zeal to satisfy the concerns of those whom the department apparently believed were the most vocal opponents of a somewhat controversial education program, is requiring all school districts in the state to develop HIV curricula with the cooperation of an advisory committee of educators, parents, one or more unidentified community representatives and at least one voice from a religious organization.

The same rationale propounded to justify the inclusion of religion on HIV curriculum committees can be used to justify giving religion a voice on every advisory committee involving textbooks, course offerings and other curriculum decisions. The legal precedent in this case reaches beyond HIV prevention education, and the arguments Amicus propounds herein regarding HIV curriculum would apply equally to any other public school curriculum. HIV curricula address a physical

health issue for children and youth. Other curricula address their academic health.

This is not to minimize the importance of HIV education. Until a cure or vaccine for HIV infection is discovered, our only protection is to teach people, particularly young people, how to avoid contracting it.

Even though the regulation at issue here is apparently the only state regulation of its kind at this time, Amicus believes that the subject of this particular regulation and applicability of the legal principles involved herein are equally applicable to other public school subjects, beg for a decision by this Court even in absence of decisions in other jurisdictions.

I. The precedent in this case would allow a state to require religious representation on advisory committees for any school curriculum.

Although the subject of this regulation is HIV prevention, the principles involved in this case would apply equally to any other

curriculum subject. For example, over the years there have been many battles fought over the teaching of evolution in the schools. See, e.g., Epperson v. Arkansas,393 U.S. 97 (1968); Edwards v. Aguillard, 482 U.s. 578 (1987). Fundamentalist Christians have challenged reading textbooks because they teach witchcraft, idol worship, values relativity and other ideas offensive to their religious beliefs. Mozert v. Hawkins County Public Schools, 827 F.2d 1058 (6th Cir. 1987). Other religious organizations have argued that textbooks establish the religion of "secular humanism." Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987) or the religion of "Witchcraft" or "Neo-Paganism." Brown v. Woodland Joint Unifed School District, No. Civ. S-91-0032 (WBS/PAN)(E.D. Calif. April 2, 1992). Still others charge that textbooks violate fundamental Christian values. Virgil v.

School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989).

A number of states, such as Texas and California, have state textbook selection committees. It is also quite common for school districts to have committees to review complaints about textbooks. If the precedent of the lower court decision is allowed to stand and the political clout of religious groups continues to strengthen, state departments of education and state legislatures will be encouraged to mandate the inclusion of religious representatives on statewide advisory committees for textbooks and local school district curriculum advisory committees.

Certainly such requirements would fly in the face of the Establishment Clause. But they are no different from the standpoint of the Constitution than the regulation at issue here.

The court below seems to have been swayed by the fact that the subject matter of the regulation is a deadly virus. As discussed further below, Amicus does not disagree with the importance placed by the lower court on HIV prevention education. But that fact does not justify violating the Constitution's ban against endorsement of religion by the State. Furthermore, the mandate in question is not only unconstitutional, it is ineffective.

II. The New York mandate jeopardizes the efficacy of its HIV prevention education program.

According to the federal Centers for Disease Control (CDC), as of June 30, 1992 there was a total of 230,179 cases of AIDS (acquired immune deficiency syndrome) reported in this country. HIV/AIDS Surveillance Report (July, 1992). CDC estimates that one in 250 persons in the U.S. is infected with the AIDS virus -- HIV. Public Health Service, America Responds to AIDS Campaign (1992). Relatively few, 872, of the AIDS cases involve 13-19 year

olds. However, 19 percent of the reported AIDS cases among males and 24 percent among females were diagnosed among people ages 20 - 29. Because of the long incubation period between infection with HIV and symptoms of AIDS, it is likely that many of these AIDS cases are the result of HIV infection acquired during the teenage years -- primarily from teenagers engaging in sexual intercourse and to a lesser extent from injection[1] drug use.

According to a report issued by the Select Committee on Children, Youth and Families, U.S. House of Representatives, A Decade of Denial: Teens and AIDS in America, the number of teens with AIDS increased by more than 70% in the past two years, with AIDS being cited as the sixth leading cause of death among youth ages 15-24.

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[1] About 18 month ago, the CDC changed the terminology from "intravenous" to "injection" because not all needle use is intravenous.

The AIDS virus knows no borders. Just as people are free to travel from state to state, the virus also travels. This case arises out of the State of New York which has the most reported cases of AIDS in the country, several thousand above the state with the second largest number, California, and over twice the number of the next state, Florida. Centers for Disease Control, HIV/AIDS Surveillance Report (April 1992). There are a number of reasons for the high incidence of AIDS cases in New York unrelated to the effectiveness of its HIV prevention education program. Nevertheless, education continues to be the only weapon against HIV infection, and school districts across the country fear that the policy adopted by the New York Board of Education will irreparably damage the HIV prevention education program in New York, exposing other states to a growing pool of transient youth who are infected.

Inclusion of religious leaders may be educationally appropriate under some circumstances. See discussion under Point V. infra, at 16. In others it may not. There is simply no valid educational reason for a statewide requirement to include religious leaders in all public school advisory committees. The only reason for such a requirement is religious. If the reason for its adoption is religious, the mandate is by definition unconstitutional. Lemon v. Kurtzman, 403 U.S. 602 (1971); Lee v. Weisman, 60 U.S.L.W. 4723 (No. 90-1014)(U.S. June 24, 1992).

III. States across the country will follow New York's lead in this area, unless restrained by this Court.

Because of New York's leadership in the development of HIV prevention education programs, other states look to New York for model policies, procedures, curricula etc. If the decision below is allowed to stand, undoubtedly other state departments of

education and state legislatures will adopt similar requirements. The subject of this case is too important to delay a decision by this Court on the important constitutional issues. School districts will be forced by their state laws to include religious leaders on local committees and risk serious dilution of the effectiveness of the programs as well as entangling the schools with religion.

IV. HIV prevention education programs being developed in public schools across the country are essential to stopping the epidemic.

NSBA has been at the forefront of the fight against the HIV epidemic through its work in HIV prevention education in the nation's public schools.

In February, 1986 NSBA held the first national forum on AIDS and the public schools at which speakers such as Dr. Anthony Fauci, Director of the Institute of Allergy and Infectious Diseases at the National Institutes of Health and Dr. Harold Jaffe, chief of the

epidemiology section on HIV activity for the CDC, addressed education leaders from across the country. NSBA believed at the time it organized the forum, and continues to believe now, that the most effective way of stopping the epidemic is through education. The public health community is counting on our nation's public schools to play a significant role in educating young people about HIV and particularly about how to assess and reduce their risk of infection.

NSBA has covered the subject of AIDS and HIV in its resolutions since 1986. Most recently, its elected leadership readopted three resolutions at the NSBA annual convention in Orlando in April, 1992.

The first deals with the treatment of students and employees who are infected with the virus. NSBA resolution 5.3.14 reads as follows:

> NSBA believes that all local school boards should adopt policies for handling communicable and

> reportable diseases, including HIV (human immunodeficiency virus) infection and disease. NSBA encourages local school boards to develop an educational program for school staff, students, and community to provide factual information about HIV and its infectious risks as a means of combating people's fears and misconceptions about HIV. In drafting policies on communicable and reportable diseases, school boards must balance the need to protect the health of students and employees with the need to protect each individual's civil rights and privacy.

NSBA resolution 5.3.15 urges boards to develop curricula on HIV prevention.

> NSBA believes that all local school boards should adopt curriculum to educate students as to the causes and effects of HIV infection and disease and the means to prevent acquiring the infection. This education is best provided within the context of a comprehensive K-12 health education curriculum.

Finally, the third resolution, section 5.3.16, relates to intergovernmental cooperation and is aimed at finding solutions to the problem of all sexually transmitted diseases and student pregnancy.

> NSBA encourages school boards working cooperatively with superintendents, administrators, faculty, parents, students, and public health officials, to assess and define their roles and responsibilities in finding solutions to the increasing rate of childhood pregnancy and of HIV infection and other sexually transmitted diseases among youth.

Twenty-one states and the District of Columbia require some form of HIV education for students, according to a survey jointly conducted by the National Association of State Boards of Education and the Council of Chief State School Officers (May 1990). To help implement school-based HIV education, the CDC provides funding to all state education agencies, to five territorial departments of education, and to 16 local education agencies in cities with a high cumulative incidence of AIDS cases. In addition, the CDC funds 22 national organizations, including NSBA, to provide information and training to their constituencies which include school board members, school administrators, teachers, and

parents, to help schools implement effective programs of health education about HIV.

The CDC has developed a set of guidelines for school districts to develop curricula on AIDS and HIV. Centers for Disease Control, "Guidelines for Effective School Health Education to Prevent the Spread of AIDS." Morbidity and Mortality Weekly Report Supplement, Vol. 37, No. S-2, (January 29 1988). The guidelines provide that to be effective, prevention education must be developmentally appropriate and provide students the knowledge and skills to influence behavior. Only the local school board knows which members of the community will be effective in assisting the schools to develop curriculum which will be effective in influencing behavior.

V. HIV Prevention Education Programs will not succeed without parental support garnered through effective use of advisory committees, the membership of which is selected locally based on local needs.

Parental support is an indispensable ingredient in any effective education program. That is particularly true of HIV prevention education programs. Because HIV is spread primarily through sexual contact and sharing of needles, the program must necessarily involve sensitive issues which can be controversial. Certain religions oppose teaching young people about avoiding HIV infection through means other than abstinence from sexual intercourse and illicit drug use, e.g., knowledge and skills related to effective condom use. Thus, religious opposition is undoubtedly why New York chose to mandate representation of religious leaders on the committee. But the purpose of the advisory committees is to assist in making the HIV prevention curriculum more effective, not just to involve those who oppose the program.

A religious representative with some particular expertise in medicine or education might be called upon by a school district in

making the program more effective. A representative from a coalition of religious groups might also be an appropriate member of the committee. But, an across-the-board requirement of religious involvement does not make good educational sense. It is simply an attempt to placate religious leaders and certainly is not a secular requirement. It also has the primary effect of giving religion a favored status over all others and entangling the school district in matters of religion.

The CDC in the development of its guidelines recognized that community support for AIDS education programs is not developed by giving a voice to only one community group, whether that group is a religious organization, a minority group, a local medical society or any other organization. To be effective, the advisory committee or other devise used by the school board to achieve community input, must be chosen by the school

district based on local needs. Individual school boards that have decided to use representatives of religious groups on their advisory committees have done so not to assure that religious messages are included in the curriculum but to provide a forum for communication among all interested community groups and, in part, to educate the members of the committee. Religious representatives are also included because of their expertise in non-religious areas, such as because of their work with disadvantaged youth etc.

In June of 1989, NSBA conducted a survey funded by the CDC. HIV Prevention Education in the Nation's Public Schools, Report of the National School Boards Association Survey, February, 1990. The purpose of the survey was to get a national picture of school district HIV Prevention Education Programs and to ascertain the parental support for the programs. On the subject of the use of advisory committees, NSBA's findings from the

survey are in line with the CDC recommendations. The data indicate that parental support of HIV prevention education is directly related to the involvement of community members in the development of HIV prevention education programs, to the use of community advisory committees, and to the official adoption of curriculum by the local school board.

Fifty-nine percent of the districts responded out of the 568 districts surveyed, representing urban, large/suburban, and rural/small districts throughout the United States. The survey results showed that seventy-nine percent of respondent school districts require HIV prevention education for their students.

School districts reporting high parental support for their HIV prevention education program also reported that they had involved a variety of community members in developing or selecting the curriculum for the program.

Parental support may be positively affected by the inclusion of religious representatives on advisory committees but that does not validate New York's action in mandating inclusion of the representative solely because of their religious status.

As indicated above, Amicus does not oppose the inclusion of such representatives. But the HIV prevention education programs and advisory committees studied by NSBA in its survey were programs developed voluntarily by the school district, the members of the advisory committee were selected by the local school district in order to achieve local goals based on local needs. Religious representatives were not included merely to fill a "religious slot."

VI. The New York mandate will undermine efforts by local school boards to gain the necessary broad-based community support for effective HIV prevention education programs.

Although the regulation at issue here may allow a broadly-based committee, its only

mandate is that the voice of religious interests be heard.

The regulation does not require that the public health community, health educators, pediatricians or any other person with medical knowledge about the disease be included. This is absurd as there are serious public misconceptions about the manner in which the virus is transmitted and the effective ways to prevent its spread and an HIV curriculum developed without the assistance of health and medical advise cannot be effective. Attempts to gain support of the religious representatives for effective HIV education through the explanation of the health implications of AIDS is certainly not guaranteed by their mandated representation.

Citing Bowen v. Kendrick, 487 U.S. 589, 607 the lower court stated that "it is particularly sensible for government to add the views of religious representatives on an advisory level to the predominant views it

will receive from the rest of the community." It may indeed be sensible in some cases as long as the representatives are not representing religion, qua religion, with little relationship to any educational rationale.

The argument that religious groups should be included on advisory committees to insure "that the AIDS instruction that is eventually adopted will more likely enjoy greater societal consensus and, therefore, greater secular effectiveness" is a slippery slope. Certainly one reason for advisory committees in general is community acceptance. But community acceptance can be gained through other means than requiring committee membership of religious representatives, who come to the committee with no other qualification than their religious viewpoint. And, indeed, in some communities the mandated inclusion of religious organizations may assure the opposite result and set adherhents

to religions not represented against the committee.

There is a narrow line that must be traversed. In an attempt to gain wide public acceptance of the curriculum schools must take care that they accommodate, but do not endorse, religion. That is not only true because the U.S. Constitution prohibits it. It is true because it is educationally unsound to graft religious messages into the public school curriculum even to gain support for a very important educational program.

Although the New York law requires "community involvement" in addition to religious representatives, the only representative guaranteed a seat on the committee is that representing religion. This specific choice made by the regulation to acknowledge the importance of religious representatives above all others exclusive is not merely an accommodation to religion.

The lower court argues that it is

important to include religious representatives in order to assure a broad consensus of the community. But the New York regulation impedes effective consensus by virtue of its mandatory nature. When a religious group knows that it is favored by state regulations and has a right to a seat on the advisory committee rather than being there as an invitee of the school district to represent one of many segments of the community, the nature of the input is changed. The representatives are less likely to listen and more likely to dictate. See, e.g., New York Times January 12, 1991, for a story on the Roman Catholic Bishop of Brooklyn's refusal to lease two unused school buildings to the New York Public Schools to house 400 students in special education programs, because of the Bishop's objection to a sex education curriculum that would be taught in the schools which the Bishop believed could "conflict with what the church teaches."

Where the seat on the advisory committee is mandated, the school board has very little flexibility in dealing with intransigence of religious leaders. Instead of being a positive force to achieve the goals of the advisory committee, any group which has a guaranteed role as a community advisor can be an impediment to the development of an effective education program.

This court has stated on numerous occasions that local educational decisions should be left to local education officials. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975) (the school board's interpretation of its own rules should control in a case brought under the due process clause); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 534 (1986) (school board can determine whether student speech in an assembly undermines the school's educational mission); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (school board has the right to determine content of

the curriculum if the actions are reasonably related to legitimate pedagogical concerns.)

Each community is different and the decision on whether, and how, to involve the clergy must be made on a local basis. Some larger communities have interfaith councils which can represent the religious community without appearing to favor one religion over another. Other communities may not have such councils and involvement of majority denomination represented in the community may send a message to members of minority religions that their faith is disfavored. See, e.g., Salt Lake Tribune, March 18, 1992, B1 for a story about the controversy over the Utah Board of Education's hiring of a Church of Latter Day Saints religion teacher to "infuse moral values into a sex education manual." Non-members of that faith objected that their views would not be represented in the manual.

This Court noted in its decision in Lee v. Weisman, supra, the "potential for divisiveness over the choice of a particular member of the clergy to conduct the [graduation] ceremony" at issue in that case. The mandate at issue here also paves the way for divisive conflict between the religious organization chosen for the mandated slot on the committee and those religious organizations which were not chosen.

CONCLUSION

Amicus recognizes that this Court is often reluctant to review a case involving a unique state law. However, the decision of the lower court sets a precedent for mandated involvement of religion in public school curriculum on every subject where religious leaders raise concerns. Advisory committees on school curriculum are common across the country, as are strong religious community concerns about the curriculum.

The fact that the committee in this case are advisory does not change the fact that school districts must pay them heed and in doing so jeopardize the integrity of the educational program and entangle school leaders with religion.

Amicus urges this Court to grant certiorari in this case.

Respectfully submitted,

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